[2007–09 Gib LR 63]

VINET and ABECASIS v. ATTORNEY-GENERAL

COURT OF APPEAL (Stuart-Smith, Ag. P., Aldous and Kennedy, JJ. A.): February 22nd, 2007

Constitutional Law—fundamental rights and freedoms—protection for privacy of home and other property—no breach of right to respect for home on making order for possession against squatters if qualifications to 2006 Constitution, s.7 applicable—possession of Government housing required to allocate it for "economic wellbeing of Gibraltar" under s.7(3)(a) and under s.7(3)(b) to protect "rights and freedoms of others" in need of housing

Housing—possession—order for possession—order for possession lawful if housing occupied by squatters/trespassers with no legal right to occupy, regardless of circumstances

The Attorney-General brought proceedings against the appellants in the Supreme Court to recover possession of a Government-owned flat in which they were squatting.

The appellants had been living in a Government-owned flat with their baby daughter. They accepted that they had been squatting there for almost two years and had applied for Government housing, but were still on the waiting list. They sought to defend the present eviction proceedings because of their lack of alternative housing options and fears that their daughter would be taken into care if they were evicted but the Supreme Court (Dudley, A.J.) made an order for possession of the flat and refused to stay it. The proceedings in the Supreme Court are reported at 2005–06 Gib LR 228.

On appeal against the refusal to grant a stay, the appellants submitted, *inter alia,* that (a) although it was accepted that there was normally no power to grant a stay of an order for possession against admitted squatters, this was an exceptional case in which the court had power to grant the stay because the Crown's conduct amounted to a breach of their constitutional rights; (b) ordering them to give up possession of the flat breached their constitutional rights because (i) it constituted "inhuman or degrading

punishment" in breach of s.5 of the 1969 Constitution because considering their circumstances—the fact that they would otherwise be homeless and the risk of their child being taken into care—it was degrading that the Government's possession of the property was seen as more important than the welfare of their child; and (ii) it also breached s.7 of the 2006 Constitution since it did not protect their right to respect for their home; and (c) the order for possession was unlawful because it defeated the purpose of the housing legislation as it was against the public interest to evict persons who would be made homeless by the order.

The Attorney-General submitted in reply, *inter alia,* that (a) this was an ordinary case of squatters in which the principal issues had been determined and the right to possession had been granted by the Supreme Court and in any case, the court had no power at common law to order a stay of eviction proceedings against squatters; and (b) the possession order did not breach the appellants' constitutional rights because (i) they could not rely solely on their personal circumstances (such as their lack of alternative housing and their fears that their child might be taken into care) to allege the breach; and (ii) since the substantive law was unchallenged, there were only two circumstances in which the court would not proceed with the order for possession—either if the law under which the order were granted was incompatible with a fundamental rights provision or if there were a challenge to a decision of a public authority—neither of which were present in this case. There were therefore no seriously arguable points on the basis of which a stay could be granted and the order for possession must be allowed to proceed.

Held, dismissing the appeal:

(1) None of the grounds raised by the appellants succeeded and the order for possession would be granted. They could not challenge the law under which the order was granted since they had admitted to having no legal right to occupy the flat. This was an ordinary case of squatters in which the Supreme Court had been correct to order possession and its decision was binding since it had already determined the issues raised on appeal. The court did not therefore have the power to stay the order for possession (paras. 17–26).

(2) The eviction of the appellants did not breach their right to protection from inhuman or degrading treatment given by s.5 of the 1969 Constitution. When considering whether there had been a breach, personal circumstances (such as their fears of their child being taken into care), could not form the sole basis of a claim. It was unclear what would happen to the appellants once evicted and there was consequently insufficient evidence to prove the situation was anything more than the eviction of squatters, which in itself was not serious enough to constitute a breach of s.5 (paras. 38–41).

(3) Nor was there a breach of the right to respect for their home given by s.7 of the 2006 Constitution since the order for possession was required for the "economic well-being of Gibraltar" (within the meaning of the exception

in s.7(3)(a)) to ensure that Government-owned housing was effectively distributed. Possession of the flat was also required pursuant to s.7(3)(b) "to protect the rights and freedoms of other persons" in greater, more urgent need of housing or those who followed the system in place (paras. 42–48).

(4) There was no factual basis for the allegation that the order for possession would not be in the public interest. The positive intentions of the Government housing scheme—to meet the housing demands of the public in need and to ensure the efficient allocation of Government-owned housing—could not be contrary to the interests of the public as they would derive benefit from the scheme. Moreover, it was in the public interest to evict squatters to enable Government-owned housing to be let to persons with priority on the waiting list and to allow for effective administration of the scheme (paras. 28–35).

Cases cited:

(1) *Akenzua* v. *Home Secy.*, [2003] 1 W.L.R. 741; [2003] 1 All E.R. 35; [2002] EWCA Civ 1470, referred to.

(2) *Avon County Council* v. *Buscott*, [1988] Q.B. 656; [1988] 2 W.L.R. 788; [1988] 1 All E.R. 841; (1988), 20 H.L.R. 385, referred to.

(3) *Kay* v. *Lambeth London Borough Council*, [2006] 2 A.C. 465; [2006] 2 W.L.R. 570; [2006] 4 All E.R. 128; [2006] H.R.L.R. 17; [2006] UKHL 10, *dicta* of Lord Hope of Craighead applied.

(4) *McPhail* v. *Persons*, *Names Unknown*, [1973] 1 Ch. 447; [1973] 3 W.L.R. 71; [1973] 3 All E.R. 393, followed.

(5) *O'Reilly* v. *Mackman*, [1982] 3 W.L.R. 1096; [1982] 3 All E.R. 680; on appeal, [1983] 2 A.C. 237; [1982] 3 All E.R. 1124, followed.

(6) *R. (Limbuela)* v. *Home Secy.*, [2006] 1 A.C. 396; [2005] 3 W.L.R. 1014; [2007] 1 All E.R. 951; [2006] H.R.L.R. 4; [2005] UKHL 66, *dicta* of Lord Bingham of Cornhill applied.

(7) *Rhondda Cynon Taff County Borough Council* v. *Watkins*, [2003] EWCA Civ. 129, referred to.

(8) *Rojas* v. *Berllaque*, 2001–02 Gib LR 252, referred to.

(9) *Three Rivers District Council* v. *Bank of England (No. 3)*, [2003] 2 A.C. 1; [2000] 2 W.L.R. 1220; [2000] 3 All E.R. 1; [2000] 3 C.M.L.R. 205; [2000] Lloyd's Rep. Bank. 235, *dicta* of Lord Steyn applied.

(10) *Tower Hamlets London Borough Council* v. *Abdi* (1992), 6 E.G.L.R. 102; 25 H.L.R. 80, referred to.

(11) *Wandsworth London Borough Council* v. *Winder*, [1985] A.C. 461; [1984] 3 W.L.R. 1254; [1984] 3 All E.R. 976; (1984), 17 H.L.R. 196, followed.

Legislation construed:

Gibraltar Constitution Order 1969 (Unnumbered S.I. 1969, p.3602), s.5: The relevant terms of this section are set out at para. 9.

Gibraltar Constitution Order 2006 (Unnumbered S.I. 2006, p.11503), Annex 1, s.7: The relevant terms of this section are set out at para. 42.

D. Hughes for the appellants;
R.R. Rhoda, Q.C., Attorney-General, for the Crown.

1 **ALDOUS, J.A.:** The appellants, Alina Abecasis and her partner Daniel Vinet, have been living together at Flat 13, 39–41 Flat Bastion Road for about 21 months. They have a daughter, Sheniah, who is now about nine months old. Flat 13 is owned by the Crown and it is accepted that the appellants were, and still are, squatters.

Background facts

2 On September 15th, 2005, the Attorney-General on behalf of the Crown instituted a claim for possession of Flat 13. He sought summary judgment pursuant to the Civil Procedure Rules ("CPR"), Part 24. That claim first came before Dudley, A.J. on March 2nd, 2006. It was adjourned twice but was heard on March 15th. In his judgment of April 28th, 2006, Dudley, A.J. concluded that there was no defence and ordered possession.

3 On May 3rd, 2006, the appellants gave notice that they intended to appeal and on May 4th, 2006, a notice of appeal was served against the decision of summary judgment for possession. I will refer to that as the first notice of appeal. However, they needed legal assistance and therefore no further step seemed practical to their advisors, until their application for substantive legal assistance was determined.

4 On May 11th, 2006, the solicitors for the appellants advised the Attorney-General's office that emergency legal assistance had been granted to issue and serve the notice of appeal but full legal assistance had not, as yet, been granted. At the call-over on July 25th, the court was advised that the appellants were not in a position to go ahead as legal assistance questions were still outstanding. Even so, the appeal was listed for September 20th, 2006. It seems that the report relating to legal assistance came through some time in August and since it did not recommend assistance for an appeal against the order made by Dudley, A.J., the appeal was stood out of the list.

5 In August 2006, the appellants sought a stay of the order for possession. Legal assistance was obtained and the application was listed for hearing on November 11th, 2006, but was subsequently adjourned. On November 16th, the Crown issued an order for possession as the Crown took the view that ample time had expired after the judgment in April for the appellants to have obtained legal assistance to appeal the April judgment.

6 After correspondence with the court, the application for a stay was listed before the Chief Justice for December 12th. After a short hearing, he

adjourned the application and referred it to Dudley, A.J. On January 15th, 2007, Dudley, A.J. refused to grant the stay. The appellants appealed that decision and on January 16th, 2007, the Chief Justice stayed execution of the order for possession until the matter could be dealt with by this court.

7 The first notice of appeal was not pursued. I need not go into detail why the appeal before the court is not against the substantive judgment and the order made by Dudley, A.J. in April. It is sufficient to note that the Legal Assistance Board concluded that the appropriate course was to seek a stay of the order for possession and thereafter legal assistance was only provided for that to be done. Against that decision, the appellants could have appealed but decided not to do so.

8 It is important to have in mind that the appeal before the court is against the refusal of an indefinite stay and there is no appeal against the substantive judgment of Dudley, A.J. given in April. Even so, the submissions advanced on behalf of the appellants were directed at the conclusions reached in April by the judge. What was said was that the issues that arose at the substantive hearing for possession were relevant to the application for a stay. It is therefore apposite to outline those submissions and the conclusions reached by the judge.

9 Before Dudley, A.J., counsel for the appellants advanced two submissions. First, that to enforce the writ for possession would mean that the Attorney-General was acting illegally. Put very broadly, the submission was that the management of Government-owned housing was controlled by the Housing (Special Powers) Act 1972 which required the Government to act in the public interest. Thus it was submitted that the Crown could not take proceedings or enforce an order which was not for the public benefit. The result in the present case was that the proceedings and the enforcement of the order for possession would be illegal as they were not for the public benefit.

10 Dudley, A.J. rejected the first submission. He said (2005–06 Gib LR 228, at para. 8):

> "What, in effect, Mr. Hughes is urging by way of defence is a judicial review not of an administrative decision (such as awarding Mr. Vinet 'Category B'), but rather in effect a review of Government housing policy as it relates to the seeking of possession against squatters and the 'turn-around time' of vacant properties."

A review of these would involve *inter alia* consideration of how a Government department budgets and applies moneys towards discharging its various obligations. Not surprisingly, Mr. Hughes is unable to refer me to any authority which would support his contention that the court can undertake what in effect would be a wide-ranging housing policy review. I am of the view that what the defendants seek to challenge is not amenable

to judicial review and therefore (leaving aside the procedural issue as to whether it could in any event be raised as a defence) it is not a substantial ground on which to defend the claim.

11 The second submission turned upon the meaning of Section 5(1) of the Gibraltar Constitution Order 1969, which provided: "No person shall be subject to torture or to inhuman or degrading punishment or other such treatment." It was submitted that the eviction from Flat 13 would amount to degrading treatment. Having reviewed two House of Lords cases which were concerned with art. 8 of the European Convention on Human Rights ("ECHR"), the judge concluded that only in highly exceptional circumstances could a squatter rely on s.5 of the Constitution. He said (*ibid.,* at para. 15):

> "It cannot be said that squatting in the premises for some 17 months prior to the issue of proceedings for possession, having very limited financial means and having a young child, amount to 'highly exceptional circumstances' so as to make the institution of proceedings or indeed the grant of an order for possession amount to 'degrading treatment.' I am therefore of the view that this other ground upon which the claim is disputed is not substantial either."

12 The submissions advanced on behalf of the appellants were supported by a witness statement. She accepted that her partner and herself were squatters. She said that if they were evicted, they could not stay with their relatives and would have nowhere to live. As they would be homeless, their daughter would probably be taken into care. An important part of her evidence was as follows:

> "I believe that there are a great many Government-owned flats standing vacant. Very little seems to be done to refurbish them or to allocate them to people on the waiting list. I do not have details, but I understand from my solicitor that, if we are allowed to defend these proceedings, the Ministry of Housing will have to disclose documents that may shed light on this."

13 In her statement she sets out the difficulties that her lawyer had had in obtaining satisfactory replies to her requests to the Ministry of Housing to be re-housed. However, it appears that Mr. Vinet was informed by the Ministry of Housing by letter, dated the March 8th, 2005, that his application was classed as "B" and that he was being placed on the housing list accordingly.

14 The solicitors acting for the Government wrote on March 8th, 2005:

> "Turning now to the issue of your clients' continued unlawful occupation of Flat 13, 39–41 Flat Bastion Road, I am instructed that the Housing Allocation Committee has considered the contents of your letter of February 17th, and rejected the suggestions contained

> therein. The Committee has a duty to all applicants for housing and to grant the relief sought by you would be to bypass the systems in place ensuring that those who have been waiting longest, with the most urgent needs, are allocated housing at the earliest opportunity. Accordingly a notice to quit will be served on your clients during the course of this week. Should your clients fail to vacate the premises, proceedings will be issued in the Supreme Court for the recovery of possession."

Thereafter the solicitors for Mr. Vinet threatened judicial review proceedings, but none were taken.

15 It is well known that there is a shortage of Government housing in Gibraltar. Thus, the Government has set up a procedure for allocation. That procedure stems from the Housing (Special Powers) Act 1972. The long title to which is as follows:

> "An Ordinance to further the proper and effective use of accommodation allotted by the Government in such a manner as to promote the public benefit by providing for the resumption of any such accommodation whenever it is not in the personal occupation of the tenant to whom it has been allotted, and for certain ancillary purposes."

16 That Act set up a committee to be known as the Housing Allocation Committee. The functions of that committee, its constitution and method of proceedings were set out in Schedule 1 to the Act. The committee consisted of five members who were required to provide a scheme for the allocation of Government housing and to make recommendations on the most equitable and effective use of Government housing. Pursuant to that requirement, the Committee provided a scheme for allocation which has been approved by the Government which scheme is considered by the committee and the Government to provide the most equitable and effective use of Government housing. It is administered by the Ministry of Housing.

The first issue

17 I will come to the submissions of Mr. Hughes on behalf of the appellants, but I must first deal with the submission advanced by the Attorney-General. The Attorney-General reminded us that the appeal was against the decision of Dudley, A.J. refusing an indefinite stay. The Attorney-General submitted that what was being sought was to stay the writ of possession as against a trespasser, despite the fact that the substantive issues had been determined against them. He went on to submit that the court did not have the power to order a stay of the writ of possession and cited in support *McPhail* v. *Persons, Names Unknown* (4). The headnote to that case in *The All England Law Reports* reflects the

decision of Lord Denning, M.R. It is in these terms ([1973] 3 All E.R. at 393):

> "When an owner came to the court asking for an order of possession against squatters, the court was bound to give him the order asked for and had no discretion to suspend the order. The courts of common law never suspended an order for possession seeing that, as against trespassers, the owner could take possession at once without the help of the courts. The owner could not, therefore, be in any worse position when he came to the courts. Furthermore there was no equitable jurisdiction to suspend an order for possession for a court of equity never intervened in aid of a wrongdoer. Accordingly, in summary proceedings by an owner under RSC Ord 113, the court was bound to make an order for the recovery of possession against squatters and could not give them any time; it was for the owner to give them such time as he thought right."

18 The Attorney-General submitted that *McPhail* was still good law and in support he drew to our attention the speech of Lord Hope of Craighead in *Kay* v. *Lambeth London Borough Council* (3). Lord Hope said that he did not believe that the *McPhail* case needed to be re-considered in the light of Strasbourg case law—Baroness Hale agreed; Lord Brown's speech was to a similar effect as was that of Lord Scott.

19 The Attorney-General stressed that there had been no appeal against the limitation of legal assistance to an application for a stay and any appeal against the refusal of that stay. He submitted that once the right to possession had been determined, as it was by Dudley, A.J., the court had no jurisdiction to stay the order.

20 Mr. Hughes accepted that, in the normal course of events, the court did not have a right to stay execution of the writ of possession but he submitted that this was not an ordinary case as the grounds relied on were illegality of the Crown and breach of constitutional rights. Mr. Hughes referred us to *Wandsworth London Borough Council* v. *Winder* (11). The holding in the headnote to that case in the *Law Reports* is as follows ([1985] A.C. at 461):

> "[T]hat it was a paramount principle that the private citizen's recourse to the courts for the determination of his rights was not to be excluded except by clear words and that there was nothing in the language of R.S.C., Ord. 53 which could be taken as abolishing a citizen's right to challenge the decision of a local authority in the course of defending an action of the present nature, nor did s. 31 of the Supreme Court Act 1981 which referred only to an 'application' for judicial review have the effect of limiting a defendant's right sub silentio."

21 That was a case where the defendant occupied a flat let by the council on a secure weekly tenancy. His objection was to paying an increase in rent. He contended that the decision to increase the rent was illegal. That case has no relevance as the tenant had a private law right to possession, unlike the appellants in this case, and in any case was not seeking to stay the writ for possession.

22 Mr. Hughes also drew our attention to *Rhondda Cynon Taff County Borough Council* v. *Watkins* (7) and *Rojas* v. *Berllaque* (8). He relied upon those authorities in support of his submission that the appellants had a right to defend the claim on public law grounds. I do not believe it necessary to decide whether the appellants could defend the claim for possession or make an application for an indefinite stay using public law defences. But I have no doubt that such defences cannot be deployed to stay the order for possession where possession has been ordered and that order is not challenged.

23 In the substantive judgment of April 2006, Dudley, A.J. rejected the two public law defences that have been deployed on appeal. He ordered possession. The appeal against that decision and subsequent order was not pursued and that decision is binding. The writ of possession followed upon the decision of the judge that the Crown was entitled to possession despite the two public law defences, and following *McPhail* (4), the court has no power to stay the order.

24 Stripping the appellants' case from the quote proposed by Mr. Hughes, it is this:

> "I accept that I am a trespasser. I resisted the claim for possession upon two public law defences, and lost. The appeal was not pursued. I have not pressed for legal assistance to appeal against that decision. However, I wish to rely upon the same defences which were rejected at first instance, in order to obtain an indefinite stay of the writ of possession. In that way I shall become entitled to remain as a trespasser in the flat indefinitely."

25 Stated like that, it is clear that it would be inappropriate to grant a stay. To make the order sought would advance the trespasser up the housing list and therefore disadvantage others that are waiting to be re-housed. It would also give them, by order of the court, protection from eviction with the right to remain indefinitely. Once the possession proceedings were determined, there were no grounds for a stay. The appeal must be dismissed upon that basis.

26 Having regard to that conclusion, there is no need for me to go on and consider the submissions of Mr. Hughes which challenged the conclusions reached by Dudley, A.J. in his April judgment. However, I

will do so, as they were dealt with by the judge and formed the basis of Mr. Hughes's submissions on appeal.

The second issue

27 Mr. Hughes, at the start of his submissions said that we should not believe that the administration of social housing in Gibraltar was as benevolent as in England. There was, in Gibraltar, no duty to house. Thus, he submitted we should be careful when applying the reasoning of English cases to this appeal.

28 Mr. Hughes submitted that it was unlawful for this court to allow the writ of possession to be enforced upon the facts of this case, as to do so would be "out of line with the powers of the Housing Act and the Constitution." I will deal with both limbs of those submissions.

29 Mr. Hughes drew attention to the long title of the Housing (Special Powers) Act 1972, which I have already read. He submitted, relying upon *Akenzua* v. *Home Secy.* (1) and *Three Rivers District Council* v. *Bank of England (No. 3)* (9), that the Government of Gibraltar could only exercise its powers for a public purpose. Those cases were concerned with complaints that there had been misfeasance in public office, and are therefore distinguishable from the present facts. However, Lord Steyn said in *Three Rivers* ([2003] 2 A.C. at 190): "The rationale of the tort is that in a legal system based on the rule of law executive or administrative power 'may be exercised only for the public good' and not for ulterior and improper purposes."

30 In the present case, the committee set up under the Act had to exercise its powers according to the Act. There is no challenge to the scheme the Committee provided nor to the way that it was administered; although such a challenge was contemplated after Mr. Vinet had been categorized as class "B."

31 Mr. Hughes's submission that the Government can only exercise its powers for a public purpose is somewhat ambiguous. If by that he means the Government must act legally, then I accept that it is correct.

32 The factual background for Mr. Hughes's submission was the evidence of the appellant, Alina Abecasis, which I have read. He submitted that it was self-evident that Government-owned housing should be occupied. In the present case flat 13 was vacant when the appellant entered into it. It is notorious that a great many Government-owned houses stood vacant. Thus it is likely that Flat 13 will stand vacant for a considerable period of time if the writ of possession was executed. That, taken with the position of the appellant and her child, demonstrated that the bringing of these proceedings and the execution of the order would not be for the public benefit and therefore would be illegal.

33 This submission, advanced by Mr. Hughes in his usual persuasive way, is untenable upon the facts of this case. For the public benefit, the Government of Gibraltar enacted the Housing (Special Powers) Act 1972 and approved the scheme allocating the limited supply of housing available and the Ministry of Housing administered the scheme. There has been no challenge to the scheme, nor to the way that it is administered. There is no evidence of maladministration such as that housing stands vacant for an unjustifiable period. In any case, it must be for the public benefit to take back into possession a flat that is being occupied by trespassers. It is only when that is done can the proper allocation of houses be carried out. To suggest otherwise means that trespassers would jump the queue.

34 Mr. Hughes blamed the absence of evidence of Government-owned flats remaining vacant unnecessarily on the failure of the Attorney-General to provide proper disclosure. That cannot be right. A defendant, such as the appellant, must produce the evidence if she wishes to rely upon facts to establish illegal acts. If she had a basis for her evidence, then it should have been given.

35 I conclude that there is no factual basis to support a case that the Government, by seeking to enforce the writ for possession, contrary to public interests and would be acting illegally. It must be in the public interest to evict squatters so that the stock of Government housing can be properly administered. To conclude otherwise, as I have said, would amount to a free-for-all. The appellants have a right to be considered for Government housing, not a right to be housed except according to the scheme.

36 Mr. Hughes realized the force of that conclusion. He sought to avoid it by accepting that it was legal to evict squatters, but he submitted that it was illegal to do so in circumstances where the eviction would result in a flat being left vacant for many months.

37 That submission cannot be accepted for two reasons. First, there is no evidence as to what will happen to Flat 13. Second, the fact that a flat is vacant does not mean that there is maladministration. It may not be in a state suitable to be allocated. It may have been offered and the person to whom it was offered is in dispute as to its condition and suitability.

The third issue

38 The second limb of Mr. Hughes's argument before the court was that the eviction of the appellants would be contrary to s.5 of the Constitution which I have already read.

39 Mr. Hughes cited *R. (Limbuela)* v. *Home Secy.* (6) as a case where acts of the State have been held to be degrading. True, but the facts were

far removed from the present case. In *R. (Limbuela)*, the asylum seekers were prevented from working, had no financial support and no housing. Lord Bingham of Cornhill said this ([2006] 1 A.C. 396, at para. 7):

> "Treatment is inhuman or degrading if, to a seriously detrimental extent, it denies the most basic needs of any human being. As in all article 3 cases, the treatment, to be proscribed, must achieve a minimum standard of severity, and I would accept that in a context such as this, not involving the deliberate infliction of pain or suffering, the threshold is a high one. A general public duty to house the homeless or provide for the destitute cannot be spelled out of article 3. But I have no doubt that the threshold may be crossed if a late applicant with no means and no alternative sources of support, unable to support himself, is, by the deliberate action of the state, denied shelter, food or the most basic necessities of life. It is not necessary that the treatment, to engage article 3, should merit the description used, in an immigration context, by Shakespeare and others in *Sir Thomas More* when they referred to 'your mountainish inhumanity.'"

As that quotation makes clear, the threshold is a high one.

40 Mr. Hughes puts the appellants' case in this way—it is degrading for the appellants and their baby to be told that their need for housing is less important than the Crown's right to obtain possession when in all probability the flat will stand vacant for a considerable period. The basis for that submission is the allegation in the appellants' evidence that the flat would probably stand vacant. But as I have pointed out, the evidential basis for the allegation is not before the court. In any case, there is no challenge to the administration of the housing scheme by the Ministry of Housing.

41 In the present case the Crown is seeking to evict a trespasser from the flat. That cannot be termed degrading within s.5. There is no evidence as to what will happen after eviction, save that it is suggested that the daughter may be taken into care. The threshold that is required to establish that the treatment is degrading has not been reached.

42 It was accepted by the Attorney-General and Mr. Hughes that by the time of the decision appealed against, the new Constitution had come into force, Annex 1, s.7 of which is as follows:

> "(1) Every person has the right to respect for his private and family life, his home and his correspondence.
>
> . . .
>
> (3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—

(a) in the interests of defence, the economic well-being of Gibraltar, public safety, public order, public morality, public health, town planning, the development or utilisation of mineral resources, or the development or utilisation of any other property in such a manner as to promote the public benefit;

(b) for the purpose of protecting the rights or freedoms of other persons;

. . .

except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society."

This provision closely resembles art. 8 of the ECHR.

43 Relying upon *Wandsworth London Borough Council* v. *Winder* (11) and *O'Reilly* v. *Mackman* (5), Mr. Hughes submitted that the appellants were entitled to rely on the whole of s.7, both as a defence to the claim for possession and as a defence to the execution of the writ for possession.

44 The Attorney-General submitted that the *Winder* case (11) was not an authority which supported the submission that s.7 provided a defence to an action for possession where the defendant had no right to the possession. In support of that submission, he referred us to *Tower Hamlets London Borough Council* v. *Abdi* (10) and *Avon County Council* v. *Buscott* (2). He went on to submit that, in any case, the proper course was for the appellants to seek judicial review, rather than rely on the public law rights in a public law case.

45 Interesting as the issue raised by that last submission is, I do not find it necessary to resolve it. I therefore will assume that the appellants were entitled to rely on their constitutional rights.

46 The Attorney-General also relied on the *Kay* case (3), to which I have already referred. That was a test case decided by seven members of the Judicial Committee. In the first case, occupiers sought to resist an order for possession with an argument based essentially on art. 8 of the ECHR. In the second, gypsies had moved their caravans onto a recreation site owned by the local authority without the authority's consent, and remained there as trespassers. They also relied on art. 8 of the ECHR to resist the claim for possession by the local authority. For the purposes of this case, it is sufficient to read from the speech of Lord Hope of Craighead which is in these terms ([2006] 2 A.C. 465, at para. 110):

"Subject to what I say below, I would hold that the defence which does not challenge the law under which the possession order is sought as being incompatible with article 8 but is based only on the

> occupier's personal circumstances, should be struck out. I do not think that *McPhail* v. *Persons, Names Unknown,* [1973] Ch. 447 needs to be reconsidered in the light of Strasbourg case law. Where domestic law provides for personal circumstances to be taken into account, as in the case where the statutory test is whether it be reasonable to make a possession order, then a fair opportunity must be given for the arguments in favour of the occupier to be presented. But if the requirements of the law have been established and the right to recover possession is unqualified, the only situations in which it would be open to the court to refrain from proceeding to summary judgment and making the possession order are these: (a) if a seriously arguable point is raised that the law which enables the court to make a possession order is incompatible with article 8, the county court in the exercise of its jurisdiction under the Human Rights Act 1998 should deal with the argument in one of two ways: (i) by giving effect to the law, so far as it is possible for it to do so under s. 3, in a way that is compatible with article 8, or (ii) by adjourning the proceedings to enable the compatibility issue to be dealt with in the High Court; (b) if the defendant wishes to challenge the decision of a public authority to recover possession as an improper exercise of its powers at common law on the ground that it was a decision that no reasonable person would consider justifiable, he should be permitted to do this provided again that the point is seriously arguable: *Wandsworth London Borough Council* v. *Winder* [1985] A.C. 461. The common law as explained in that case is, of course, compatible with article 8. It provides an additional safeguard."

47 Mr. Hughes sought to distinguish the reasoning in that paragraph because the terms of s.7 were not the same as art. 8 of the ECHR. That, in my view, is a distinction without a difference. Essentially the relevant rights are the same in art. 8 as in s.7 and I believe the reasoning of Lord Hope of Craighead applies in this case.

48 In the present case, the law under which possession was ordered was not challenged, nor could it be. The appellants accepted that they were trespassers who had no legal right to a tenancy or to occupy. What was relied on were the appellants' circumstances, namely that they would be made homeless and their child would probably be taken into care. The law of Gibraltar does not provide for personal circumstances of that nature to be taken into account as a defence. In any case, I do not consider that the appellants' s.7 rights have been compromised, having regard to the exceptions in s.7(3)(a) and (b). Possession was needed to protect the rights of others on the housing list who were considered to have more urgent needs for housing. That, together with a proper administration of housing, is essential for the economic well-being of Gibraltar.

49 I therefore come to the conclusion that, even if there had been an

appeal against the April judgment of Dudley, A.J., it would have failed. I conclude that the appeal should be dismissed.

50 **STUART-SMITH, Ag. P.** and **KENNEDY, J.A.** concurred.

Appeal dismissed.